Supreme Court, U.S.
FILED
SEP 22 1995

No. 95-111

In the Supreme Court of the United States

OCTOBER TERM, 1995

DELCO DEVELOPMENT COMPANY, INC., ET AL., PETITIONERS

v.

MECHANICS AND FARMERS SAVINGS BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER, IN OPPOSITION

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QUESTION PRESENTED

Whether, in a suit by the Federal Deposit Insurance Corporation, as receiver, to enforce petitioners' loan guaranties, the Connecticut Supreme Court correctly rejected petitioners' assertion of a defense based on a co-guarantor's satisfaction agreement with the failed savings bank.

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OPINIONS BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 1A-5A) is reported at 656 A.2d 1034. The opinion of the Connecticut Superior Court (Pet. App. 6A-22A) is reported at 656 A.2d 1075.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on April 11, 1995. The petition for a writ of certiorari was filed on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On May 17, 1988, petitioner Delco Development Company borrowed $3,500,000 from Mechanics and Farmers Savings Bank (the Bank). The loan was evidenced by a variable rate promissory note (the Note), and secured by a mortgage on real property (the Mortgage), both dated May 17, 1988. Dennis Nicotra, and petitioners Robert Ginsburg and Gary Ginsberg, who were shareholders in Delco, each executed an unconditional written guaranty of all of the obligations due under the Note. Pet. App. 2A, 8A. On February 21, 1990, Delco and the Bank executed a modification agreement, altering the interest rate on the Note and extending the maturity date of the loan. The guarantors consented in writing to those modifications, and each expressly guaranteed Delco's prompt payment of the Note, as modified. *Id.* at 2A, 8A-9A. Shortly thereafter, Delco defaulted on the loan. *Id.* at 2A, 9A.

2. On or about August 28, 1990, the Bank commenced foreclosure proceedings in Connecticut Superior Court, and sought a deficiency judgment against Delco and the guarantors. FDIC C.A. Br. 3; Pet. App. 2A-3A. On August 9, 1991, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for the Bank; the FDIC was substituted as plaintiff on March 9, 1992. Pet. App. 8A.

Petitioners pleaded five special defenses. Pet. App. 3A, 9A. The first four alleged, on various grounds, that the loan transaction was ultra vires and unenforceable. *Ibid.* The fifth special defense was based on a July, 1991, agreement among Nicotra, the Bank, and Nicotra's other creditors (the Nicotra Agreement), which restructured, modified, compro-

mised, and liquidated Nicotra's various debts. *Ibid.*; FDIC C.A. Br. 4. Petitioners were not parties to the Nicotra Agreement. They claimed, however, that the Bank stood to receive a $2 million benefit from that agreement, and they contended, on that ground, that Nicotra's execution of the agreement constituted a $2 million partial payment of the outstanding balance on the Delco loan. Pet. App. 3A.

After a bench trial, the court rejected all five special defenses[1] and entered a Judgment of Strict Foreclosure. Pet. App. 6A-22A. Addressing petitioners' fifth special defense, the trial court disagreed with petitioners' contention that the execution of the Nicotra Agreement was tantamount to a partial payment of the loan. In the court's view, petitioners had "no legal or equitable basis * * * upon which * * * [to] argue that an agreement negotiated by Nicotra to satisfy his debts, [an agreement] which apparently failed in the end, [could be] applicable to them." *Id.* at 19A. The court also ruled, in the alternative, that petitioners could not raise the Nicotra Agreement as a defense to the FDIC's enforcement of their guaranties because the agreement did not comply with the requirements of 12 U.S.C. 1823(e) (Supp. V 1993).[2] The court noted that

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[1] Petitioners did not appeal the trial court's rejection of their first four special defenses, Pet. App. 3A, and those determinations are therefore no longer at issue.

[2] 12 U.S.C. 1823(e) (Supp. V 1993) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any

the Nicotra Agreement was neither signed by petitioners, nor executed contemporaneously with acquisition of the asset being foreclosed, *i.e.*, the 1988 Note, as modified in 1990. Additionally, the court was not persuaded that the Nicotra Agreement was ever approved by the Bank's board of directors or reflected in the board's minutes, since petitioners offered no copies of actual minutes into evidence at trial. Pet. App. 20A.

3. Petitioners appealed to the Connecticut Appellate Court. While their appeals were pending, petitioners filed with the trial court a Motion for Articulation, inquiring whether the court had held that a 1989 amendment to Section 1823(e), which extended the protections of the statute to the FDIC, in its capacity as receiver, was retroactively applicable to the loan transaction. The trial court refused to rule, at that stage of the proceedings, on the retroactivity question:

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insured depository institution, shall be valid against the Corporation unless such agreement—

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

> The Defendants, despite ample opportunity by way of pre-trial and post-trial briefs and arguments, did not claim at trial that §1823(e) was inapplicable to the transactions in question, nor did they raise any issue of retroactivity. Therefore, this court declines to answer the question presented in the Motion for Articulation.

FDIC C.A. Br. 7-8.

4. The Connecticut Supreme Court took jurisdiction of the case from the Appellate Court and affirmed. Pet. App. 2A. It observed that the trial court had rejected petitioners' fifth special defense as both (i) unfounded in law or equity and (ii) barred by Section 1823(e). *Id.* at 4A. Agreeing with those conclusions, it adopted the trial court's decision "as a statement of the facts and applicable law." *Id.* at 5A. The court declined to address petitioners' retroactivity argument, because of petitioners' failure to raise the claim at trial. *Id.* at 5A n.3.

ARGUMENT

1. Petitioners argue (Pet. 12-26) that the Connecticut Supreme Court erred in concluding that 12 U.S.C. 1823(e) (Supp. V 1993) barred their assertion of the Nicotra Agreement as a defense to enforcement of their guaranties. Petitioners point out (Pet. 14) that, while the Note was executed in 1988, the protections of Section 1823(e) were not extended to the FDIC, in its capacity as receiver, until Congress amended the statute in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. In petitioners' view, Section 1823(e) cannot lawfully be applied "to defeat defenses relating to a transaction whose genesis predated the effective date of [FIRREA]." Pet. 22.

There is some disagreement among the courts of appeals respecting the retroactive application of Section 1823(e) to bar defenses against claims made by the FDIC, as receiver. Compare *FDIC* v. *Wright*, 942 F.2d 1089, 1095-1097 (7th Cir. 1991) (applying Section 1823(e) to bar assertion of pre-FIRREA agreement as defense against the FDIC, as receiver), cert. denied, 504 U.S. 909 (1992); *FDIC* v. *Kasal*, 913 F.2d 487, 493 (8th Cir. 1990) (same), cert. denied, 498 U.S. 1119 (1991); and *FDIC* v. *Longley I Realty Trust*, 988 F.2d 270, 273-274 (1st Cir. 1993) (same) with *Oklahoma Radio Associates* v. *FDIC*, 987 F.2d 685, 695-696 (rejecting retroactive application of the statute), motion to vacate denied, 3 F.3d 1436 (10th Cir. 1993). That issue, however, is not presented in this case.

a. The trial court rejected petitioners' assertion that the Nicotra Agreement decreased petitioners' exposure on the Delco loan by $2 million, because the court concluded that "[t]here [wa]s simply no legal or equitable basis * * * upon which [petitioners] c[ould] argue that an agreement negotiated by Nicotra to satisfy his debts * * * [wa]s applicable to them." Pet. App. 19A. In light of the court's observation (*ibid.*) that the Nicotra Agreement "apparently failed in the end," its conclusion that the execution of the agreement did not affect petitioners' obligations on the loan appears sound. The court's state-law-based ruling in that regard was, in all events, a sufficient ground for its rejection of petitioners' defense. The court's alternative holding respecting the preclusive effect of Section 1823(e) was, therefore, not necessary to its disposition of the case. That holding is accordingly not subject to further review. See *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983)

(Court lacks jurisdiction over the judgment of a state court that rests on both federal and non-federal grounds "if the non-federal ground is independent of the federal ground and adequate to support the judgment") (quoting *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)).

b. Petitioners are, moreover, procedurally barred from protesting that the trial court erred in applying Section 1823(e) retroactively. When a petitioner seeks review of a state court determination, "[a]t a minimum, * * * there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of [their] federal claim at the time and in the manner required by the state law." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981). In this case, the Connecticut Supreme Court declined to address petitioners' retroactivity argument, in accord with well-settled Connecticut law, because of petitioners' failure to raise that argument at trial. Pet. App. 5A n.3. See Connecticut Practice Book § 4185; *Skrzypiec* v. *Noonan*, 633 A.2d 716, 722 (Conn. 1993) (supreme court will not address claims not raised before trial court); *Texaco, Inc.* v. *Golart*, 538 A.2d 1017, 1020 (Conn. 1988) (same); *Enquire Printing & Publishing Co.* v. *O'Reilly*, 477 A.2d 648, 652-653 (Conn. 1984) (same).

Petitioners correctly note (Pet. 13) that this Court may, on due process grounds, disregard a state court's application of a procedural bar when the bar is not applied "evenhandedly to all similar claims," *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-265 (1982), but petitioners have made no showing that the Connecticut Supreme Court's refusal to consider

their retroactivity argument in this case conflicts with that court's treatment of procedural default in any similar case. While petitioners claim that the retroactive application of Section 1823(e) was cognizable as "plain error," the plain error doctrine is generally reserved, under Connecticut law, for circumstances in which there has been "[a]n oversight of a clearly applicable statute," *Hartford Fed. Sav. & Loan Ass'n* v. *Tucker*, 436 A.2d 1259, 1260 (Conn. 1980), or an error that "implicate[s] a constitutional right or an important, general interest," *Golart*, 538 A.2d at 1020. As we have noted, three of the four courts of appeals that have addressed the retroactive application of Section 1823(e) have concluded that the statute applies retroactively to bar defenses against claims made by the FDIC, as receiver. Regardless of whether those decisions are correct (as we believe they are[3]) they constitute the clear weight of authority, and it is difficult to see how the trial court could have committed "plain error" by following them.

c. In any event, even if there were not an independent and adequate state ground for the judgment, and even if petitioners had not waived the argument through procedural default, this case would still be an inappropriate vehicle for resolving whether the 1989 amendment to Section 1823(e) applies retroactively because, in this case, the trial court applied the statute prospectively. This case bears no resemblance to *Oklahoma Radio Associates* v. *FDIC*, *supra*, where the execution of the relevant agreement and the appointment of the FDIC as receiver both pre-dated

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[3] See *Wright*, 942 F.2d at 1095-1097 (explaining rationale for retroactive application).

FIRREA. 987 F.2d at 688. Here, the agreement at issue—the Nicotra Agreement—was executed in July, 1991, Pet. App. 3A, and the FDIC was not appointed as receiver until August, 1991, *ibid.* The events that triggered the application of Section 1823(e), therefore, occurred almost two years after the statute was amended by FIRREA.[4]

2. Petitioners also argue (Pet. 26-27) that the Connecticut Supreme Court erred in concluding that the Nicotra Agreement failed to satisfy Section 1823(e). As noted, because the state court's judgment rested on independent and adequate state grounds, its application of Section 1823(e) to the facts of this case is not subject to further review. In all events, petitioners' are incorrect in asserting that the Nicotra Agreement satisfied Section 1823(e). As this Court has observed, a party asserting the existence of an agreement as the basis for a claim or defense against the FDIC must demonstrate compliance with all of the statute's requirements. *Langley* v. *FDIC*, 484 U.S. 86, 95 (1987). Those requirements include the requirement that the agreement have been "approved by the board of directors of the depository

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[4] It is irrelevant that the underlying loan transaction was initiated prior to FIRREA. The trial court did not prevent petitioners from asserting a defense based on the Note or the Mortgage, and it did not hold that either of those documents failed to comply with Section 1823(e). But even if the date of the underlying transaction were somehow relevant to the analysis, the original loan documents were modified, and the guarantors tendered written consents to those modifications, in February, 1990. Pet. App. 8A-9A. As petitioners observe (Pet. 23), the 1988 and 1990 transactions were essentially "*one* transaction," and that transaction was completed only after FIRREA's 1989 enactment.

institution or its loan committee, * * * [and] reflected in the minutes of said board or committee." 12 U.S.C. 1823(e)(3) (Supp. V 1993). Here, although petitioners' counsel testified that the Nicotra agreement was approved by the Bank's board of directors or loan committee and reflected in the minutes, the trial court was not convinced by that testimony, see Pet. App. 20A, and petitioners failed to offer into evidence actual minutes to substantiate their claim, *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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